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No. 83-941

In the Supreme Court of the United States

OCTOBER TERM, 1983

IOWA ELECTRIC LIGHT AND POWER COMPANY,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether substantial evidence supports the Board's determination that three quality control inspectors at petitioner's nuclear power plant are not supervisory or managerial employees within the meaning of the National Labor Relations Act, 29 U.S.C. (& Supp. V) 151 *et seq.*

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. D1-D7) is reported at 717 F.2d 433. The decision and order of the National Labor Relations Board (Pet. App. C1-C14) is reported at 264 N.L.R.B. No. 21. The decision and direction of election by the Board's Acting Regional Director in the underlying representation proceeding (Pet. App. A1-A8) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on September 12, 1983 (Pet. App. E1). The petition for a writ of certiorari was filed on December 7, 1983. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. (& Supp. V) 151 *et seq.*, are set forth at Pet. App. F1-F3.

STATEMENT

1. Petitioner operates a nuclear power plant in Linn County, Iowa. The International Brotherhood of Electrical Workers, Local 204, AFL-CIO (the Union) represents production and maintenance employees at the plant. In February 1979, the Union petitioned to represent the plant's three quality control inspectors, Level II, who had not previously been represented in collective bargaining. Pet. App. A2-A3.[1]

Quality control at all nuclear power facilities is governed in part by regulations of the Nuclear Regulatory Commission (NRC). 10 C.F.R. Pt. 50 App. B. Those regulations define "quality control" as the operative component of the overall "quality assurance" program required for nuclear plants. As defined by the regulations, quality assurance comprises (Pet. App. F3-F4):

> [A]ll those planned and systematic actions necessary to provide adequate confidence that a structure, system, or component will perform satisfactorily in service. Quality assurance includes quality control, which comprises those quality assurance actions related to the physical characteristics of a material, structure, component, or system which provide a means to control the quality of the material, structure, component, or system to predetermined requirements.[2]

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[1] The parties stipulated before the Board that if the quality control inspectors were found to be entitled to representation, they would be included in the existing production and maintenance unit already represented by the Union (Pet. App. A2).

[2] The NRC also issues guidelines, known in the industry as "WASH" documents, to facilitate the establishment of programs

Petitioner's quality control department is headed by a quality supervisor, who reports directly to petitioner's vice president for energy and utilization (Pet. App. A4-A5; Tr. 83-84, 108-109; Co. Exh. 2). Planning and policy-making for the department take place under the authority of petitioner's senior vice president for engineering (Tr. 24; Co. Exh. 2). Within the department, the inspectors whose status is at issue here report to a quality control outage coordinator or quality engineer; the engineer and outage coordinator report to the quality supervisor (Pet. App. A4).[3]

In general, Level II quality inspectors perform inspections and tests to determine whether materials components, systems and work procedures conform to

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in conformance with the regulations (Tr. 18, 21-22; Co. Exh. 4, at A/B-1). The WASH documents incorporate and supplement standards formulated by the American National Standards Institute, known as "ANSI" standards (Tr. 27-28; Co. Exh. 6).

References herein to the transcript of the representation hearing before the Board (Tr.) and to petitioner's exhibits introduced at that hearing (Co. Exh.) are taken from the Board's brief in the court of appeals.

[3] Guidelines for the organizational structure of the quality control department are set forth in the NRC regulations (10 C.F.R. Pt. 50 App. B (Pet. App. F4-F5)):

> The persons and organizations performing quality assurance functions shall have sufficient authority and organizational freedom to identify quality problems; to initiate, recommend, or provide solutions; and to verify implementation of solutions. Such persons and organizations performing quality assurance functions shall report to a management level such that this required authority and organizational freedom * * * are provided. Because of the many variables involved, such as the number of personnel, the type of activity being performed, and the location or locations where activities are performed, the organizational structure for executing the quality assurance program may take various forms provided that the persons and organizations assigned the quality assurance functions have this required authority and organizational freedom.

predetermined quality standards. The inspections and tests are performed in accordance with "checklists" that identify the standard that must be satisfied. The checklists are prepared by the quality engineers or the quality supervisor in accordance with in-house procedure manuals. Pet. App. A3; Tr. 57-58, 131-133, 135. The inspectors are required to conduct their tests in strict conformity with the checklists. Inspectors have no authority to make any changes in the checklists or standards without the approval of the quality supervisor. Although most inspections occur at regular preplanned intervals, inspections may be requested at any time by a quality engineer or the quality supervisor. Pet. App. A3-A4.

Pursuant to governmental regulations, "hold points" are incorporated into certain work procedures at the plant. Hold points are those points beyond which work may not proceed until an inspector has determined that work already performed meets quality standards. If, at a hold point, an inspector determines that a particular condition does not meet quality assurance requirements, he must complete a Material and Activities Occurrence Report (MAOR). The MAOR is submitted to the quality supervisor, who determines what, if any, corrective action shall be taken. The department responsible for the particular work may then be instructed to correct the deficiency. The inspectors themselves do not assign the corrective work; nor do they have the authority to change the acceptance criteria at the hold points. Inspectors generally do not advise employees as to whether they should continue to work past the hold points. Pet. App. A3-A4, D6. In some cases, an MAOR ultimately may result in disciplinary action being initiated against an employee by higher management, but the inspector who completes the MAOR does not recommend disciplinary action, nor is the completion of the MAOR construed as such a rec-

ommendation. Pet. App. A4; Tr. 63-64, 127. Finally, in addition to their actual inspection duties, inspectors occasionally provide input concerning revisions of the various manuals that define their inspection procedures. Pet. App. A4; Tr. 37-39, 42, 72-73, 126, 140.

The inspectors have offices in the receiving area of the warehouse, a building different from that housing their supervisors' offices. They rarely, if ever, attend management meetings. Moreover, they have no authority to hire, fire, promote, transfer, discipline, interview or otherwise supervise employees, to assign work, or effectively to recommend such action. They perform no function with respect to grievances, nor are they consulted about labor-management relations. Pet. App. A4-A5.

2. The Board, adopting the decision of its Acting Regional Director, found on the above-stated facts that inspectors are neither managerial nor supervisory employees under the National Labor Relations Act, 29 U.S.C. (& Supp. V) 151 *et seq*. The Board found that inspectors do not formulate management policy and have no discretion in performing their jobs independent of petitioner's established policies. It further found that they have no direct or indirect authority over other employees, nor any power to make recommendations concerning other employees. The Board specifically found that inclusion of the inspectors in the bargaining unit would not create a conflict of interest with any other employees. Pet. App. A5-A6, B1.

The Board accordingly ordered an election to determine whether the inspectors wished to be included in the existing bargaining unit (Pet. App. A6-A8). On August 8, 1979, the inspectors designated the Union as their bargaining representative (*id.* at C7).

3. Petitioner refused to recognize the Union as the representative of the quality control inspectors, and the Union filed an unfair labor practice charge with the

Board in February 1982.[4] The Board's General Counsel issued a complaint and moved for summary judgment on the ground that all issues relevant to the unfair labor practice charge were, or could have been, litigated in the prior representation proceeding. The Board granted summary judgment, finding that petitioner had violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1), and ordered petitioner to recognize and bargain with the Union as representative of the inspectors. Pet. App. C1-C12.

4. The court of appeals found that substantial evidence supported the Board's conclusion that the inspectors are neither supervisory nor managerial employees under the Act (Pet. App. D1-D7). Specifically, the court of appeals rejected petitioner's contention that, because an inspection can result in changes in working assignments, quality control inspectors effectively "assign work," one of the indicia of a supervisory employee. As the court of appeals noted (*id.* at D4-D5):

> The Board found that the Inspectors have no authority or discretion to change or waive the acceptance criteria at the hold points. Their "decisions" are merely that the criteria are not met, not that work must stop or that the plant must be shut down. Further, the Inspectors themselves do not

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[4] Prior to filing the charge with the Board, the Union filed a grievance over petitioner's refusal to bargain, which petitioner denied. The Union then filed suit in federal district court under Section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. 185, claiming that petitioner's refusal to bargain constituted a breach of the collective bargaining agreement. The district court ruled in favor of the Union, *Local 204, IBEW* v. *Iowa Electric Light & Power Co.*, 496 F. Supp. 873 (N.D. Iowa 1980), but the court of appeals reversed with directions to dismiss for lack of jurisdiction. *Local 204, IBEW* v. *Iowa Electric Light & Power Co.*, 668 F.2d 413 (8th Cir. 1982). The Union thereafter reiterated its request that petitioner bargain with it as representative of the inspectors and petitioner again refused.

> order the corrective work; they merely report the deficiency to the Quality Supervisor, who decides what corrections must be made. The Board found that corrective action and the halting of work are part of the process rather than consequences of an Inspector's independent decision. These findings support the Board's conclusion that Inspectors do not assign or direct work.

The court likewise rejected the argument that because the MAORs written by inspectors are used in the disciplinary process against other employees, the inspectors are responsible for disciplining other employees (*id.* at D5):

> The Board found that Inspectors do not recommend that employees be disciplined; the main purpose of the MAOR is to point out a deficiency, not to point out who has made a mistake. Further, the Inspectors play no further role in any disciplinary decisions. This evidence provides substantial support for the Board's conclusion that the Inspectors do not discipline employees and thus are not supervisors. [5]

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[5] The court of appeals also rejected petitioner's contention that the NRC regulations and supplemental ANSI standards require quality control inspectors to be supervisors within the meaning of the Act. Petitioner relied on language in the regulations (note 3, *supra*) to the effect that "persons and organizations performing quality assurance functions shall have sufficient authority and organizational freedom to identify quality problems; to initiate, recommend, or provide solutions; and to verify implementation of solutions." In addition, petitioner cited an ANSI standard providing that Level II inspectors "shall be capable of supervising or maintaining surveillance over the inspections and tests performed by others * * *" (ANSI N45.2.6-1973). The court of appeals held that the NRC regulations do not require that inspectors actually be vested with supervisory authority, but only that there be sufficient supervisory authority vested in whatever organizational structure a utility might choose for its quality assurance functions. The court further found that petitioner had elected to vest the au-

The court of appeals accordingly enforced the Board's order in its entirety.

ARGUMENT

1. Petitioner contends (Pet. 7) that the findings of the Board, sustained by the court below, are not supported by substantial evidence. This challenge presents only an evidentiary issue that does not warrant review by this Court. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951). In any event, as the court of appeals found, the facts summarized in the statement above (pages 2–5, *supra*) provide ample support for the Board's conclusion that the inspectors are neither managerial nor supervisory employees under the Act.[6]

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thority required by the NRC in the quality supervisor, not the inspectors, and that there was no evidence that inspectors actually possessed supervisory or managerial authority. The court therefore concluded that the Board's decision was not inconsistent with the NRC regulations. Pet. App. D5-D6.

In addition, the court of appeals rejected the contention of other utilities as amici curiae that inspectors, if allowed to join the Union, would have a conflict of interest when inspecting work done by fellow union members because their possible desire to protect fellow members might outweigh their job duties and thereby threaten plant safety. The court noted that the inspections carried out by the inspectors are not automatically related to decisions to discipline employees. It further noted that inspectors are carefully supervised and that "there is nothing in the record to suggest that the Inspectors would ignore mistakes or insufficiencies. In light of their sure knowledge of the potentially deadly consequences of overlooking mistakes, we cannot assume that the Inspectors would be callously irresponsible" (Pet. App. D7).

[6] Petitioner also repeats its claim (Pet. 3-7), properly rejected by the court of appeals (see note 5, *supra*), that the NRC regulations and ANSI standards require the conclusion that Level II quality control inspectors are supervisors under the Act. As the court of appeals concluded, the regulations do not require that any particular authority rest with the inspectors and petitioner has vested the management authority required by the NRC in

Moreover, there is no conflict between the decision in this case and any decision of this Court or any other court of appeals. The cases cited by petitioner (Pet. 13-15) involved bona fide supervisory personnel— variously referred to in the industry as shift operating supervisors, system supervisors, or control room foremen—who are in charge of the plant control room and who are required to exercise independent judgment and directly supervise plant personnel in dealing with the contingencies that arise in generating and transmitting electric power. See *Southern Indiana Gas & Electric Co.* v. *NLRB*, 657 F.2d 878, 880-884 (7th Cir. 1981); *Maine Yankee Atomic Power Co.* v. *NLRB*, 624 F.2d 347, 352-359 (1st Cir. 1980); *NLRB* v. *Detroit Edison Co.*, 537 F.2d 239, 240-244 (6th Cir. 1976); *Arizona Public Service Co.* v. *NLRB*, 453 F.2d 228, 231-233 (9th Cir. 1971); see also *Monongahela Power Co.* v. *NLRB*, 657 F.2d 608, 610-611 (4th Cir. 1981). In such cases, the Board now holds such personnel to be super-

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the quality supervisor and his superiors, not in the inspectors. Moreover, there is no evidence that the inspectors actually possess supervisory authority of any kind. Absent such evidence in the record, the descriptive terms of the ANSI standards and the NRC regulations relied on by petitioner are not determinative of whether the inspectors are managerial or supervisory employees for purposes of the Act.

Finally, as the court of appeals also concluded (see note 5, *supra*), there is no evidence to support petitioner's suggestion (Pet. 11-12) that the inspectors' "fraternal union feelings" will impair their ability to perform their jobs. Inspectors simply have no responsibility for any recommendations or decisions that directly affect their fellow employees. Moreover, they are required to perform their inspections in strict conformity with established policy and thus have no discretion to "look the other way" in carrying out their tasks. See *Bechtel, Inc.*, 225 N.L.R.B. 197 (1976) (holding that quality control inspectors are not supervisory or managerial employees where their decisions are limited by pre-existing established policy and their employer has some degree of oversight over their functions).

visors within the meaning of the Act. *Big Rivers Electric Corp.*, 266 N.L.R.B. No. 72, slip op. 9-12 & n.2 (Mar. 7, 1983) (overruling prior decisions). The holdings concerning the status of the personnel involved in those cases were based on the authority of the supervisors independently to make technical and complex decisions, in both routine and emergency situations, concerning the amount and source of power to be generated and transmitted, *NLRB* v. *Detroit Edison Co.*, 537 F.2d at 241-244; to direct other employees in the execution of complex switching orders and, in emergency situations, to make initial work assignments, *Big Rivers Electric Corp.*, slip op. 10-11; to switch the flow of power from one line to another to facilitate repairs, *Southern Indiana Gas & Light Co.* v. *NLRB*, 657 F.2d at 881; to direct plant and field personnel under emergency conditions and in other contingencies, *Arizona Public Service Co.* v. *NLRB*, 453 F.2d at 231; to shut down operations if the supervisor determines that safety so requires, *Maine Yankee Atomic Power Co.* v. *NLRB*, 624 F.2d at 352; and to evaluate and make recommendations concerning hiring, discipline, and promotions, *id.* at 359.

As we have shown above, the quality control inspectors involved here do not have the responsibilities and authority possessed by the control room supervisors in the foregoing cases. Accordingly, those decisions present no conflict with the decision below, but merely reflect application of the same governing legal principles to differing factual situations.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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